

A Game of Values: Particular National Identities Awaken in Europe

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“Winter is coming”

(George R. R. Martin, A Game of Thrones)

This article focuses on the relation between constitution and society, namely how the popular perception of identity and values can impact on constitutional democracy and its institutions, and how the reformulation of national identities can endanger the European project and constitutional democracy itself.

When national identities are (re)defined along cultural, ethnic or religious characteristics, there seems to be a “zero-sum game” between the constitutional recognition of these characteristics and liberal values that include equality and human rights. The dual movement of strengthening cultural, ethnic or religious characteristics and of weakening liberal values in many countries can be traced back, at least partly, to global phenomena like economic downturn and restructuring, the advance of the far-right and the crisis of the left, the movement of formerly extremist ideas into mainstream discourse, the call for authoritarian leaders.ⁱ First, all these show resemblance to the interwar period. And second, because of the interconnectedness of national developments, it is not enough to look at the Hungarian or the Polish democratic backlash, Brexit or other events like the authoritarian turn in Turkey or the US presidential elections in isolation: I argue that a crucial factor in understanding “the zero-sum game” is to unearth the common features, in addition to the national peculiarities. This article raises the questions whether the emergent authoritarianism in the Central and Eastern Europe (CEE) region may contain lessons for what is going on in Western Europe.

Transforming National Identities

All constitutional systems require the construction and definition of a constitutional ‘We’ in the name of whom the system talks and works. The national/constitutional identities of states are partly determined by the relation to historical, religious, ethnic identities. Identification with a constitution and a constituted community is often too abstract to attract popular loyalty. Recent developments have shown that many people across Europe prefer historical, religious, ethnic identities and the shared heritage of the local societies in which they live; and define their identity against liberal values.

Some of the reasons of recently changing national identities of member states are rooted partly in global societal processes, such as economic downturn and restructuring that can result in social conflicts, or the return to local communities and premodern, nationalistic values, which goes against the traditions of the Enlightenment and the principle of equality. We are witnessing changes in the political system, too: the advance of the far-right and the crisis of the left. Previously extremist ideas are moving into mainstream discourse, the radical right is gaining more and more influence in Europe and racism is on the rise. It is no accident that some authors have raised the question whether interwar Europe is comparable with the present situation.ⁱⁱ There are not only differences (e.g. alterations in the role of media, and in institutions) but also similarities between the debt crisis of 2009, leading to an economic downturn and the great Depression of 1929, and the 1930s’ turn into dictatorship and the spread of antisemitism are comparable with the recent trends of growing racism (anti-Muslim, anti-immigrant, anti-Roma sentiments) and attacks against democratic institutions.ⁱⁱⁱ

If we will look at the recent authoritarian tendencies in CEE, the goal, in line with the idea of the important element of interconnected developments, is to go beyond the common explanations that point out the lack of democratic experience, the weakness of civil society and the public desire for a strong leader. The societal trends of Member States cannot be examined in isolation: if the processes are interrelated, constants are crucial

in understanding the interconnectedness. For instance Brexit and the Hungarian crisis have common features: the fears from losing sovereignty (“taking back control” from the EU), nostalgia for historic grievance (for the British Empire and for Hungary before Trianon), the idea of a state with a closed border, arguments against migration and multiculturalism.^{iv} Furthermore, this vision of the national identities in the two cases implies not merely intolerance but also the need for identifying who is “the other” (the EU, ethnic minorities, migrants, refugees). Not in the same way but both of the crises are about the self-identification of the people and the separation from others, and the other is typically foreign, belongs to a minority and European. The British case combines, similar to the Hungarian case, Euroscepticism with human rights scepticism.^v Brexit is sometimes discussed not only as an exit from the EU but also as partly an exit from the ECHR.

Without implying that recently the Hungarian autocratic regime and the UK constitutional democracy are in any way similar to each other, it has to be seen that societal processes which are behind the Hungarian constitutional turn or the Polish democratic backlash appeared in other member states too and they shape their national identities and mean a real danger for old constitutional democracies too. And needless to say, these processes have an impact outside of the EU. The clearest and most recent example is the presidential election campaign and the victory of Donald Trump, who used arguments similar to the ones that appeared under the Hungarian constitutional turn: removing “criminal” and illegal immigrants, building a wall on the southern border, making the US “great again”. The first comment of the Hungarian prime minister after Trump’s Victory was the following: [“Congratulations, this is very good news, the democracy is still alive!”](#)

Furthermore, the vision of national identities in the various cases implies not merely intolerance but also the need for identifying who “the other” is (the EU, ethnic minorities, migrants, refugees). The process of self-identification involves the separation from others, and the other is typically foreign and belongs to a minority or, for that matter, Europe. The formulation of national identity of the state follows the logic pointed out by Karl Schmitt: it is partly based on the differentiation between we/the nation and they/others (European Union, European/human rights/migrants/minorities).

A Need for a New Approach

It is hard to say whether the recent clash between values and its consequences (e.g. the democratic backlash in CEE countries) were foreseeable or not, the conflict certainly didn’t come out of the blue. Before the Eastern enlargement, the EU had a fear of a nationalistic backlash in the new democracies. Although former state-socialist countries became constitutional democracies and according to the Commission they fulfilled the political criteria of European accession (stability of institutions, democracy, the rule of law, human rights and respect for and protection of minorities), the EU formed a more benign image of certain new member states than the real situation would have allowed for, because it focused mainly on their legal systems and expected CEE Member States to improve within the EU.

Some other recent clashes between Member States national identities and the European Union could have been foreseen, too, such as the EU’s conflicts with the UK and Poland. With protocol No. 30 to the Lisbon Treaty, Poland and the United Kingdom wanted to step back from the binding provisions of the Charter on Fundamental Rights. According to the Protocol the Charter does not give national or European Courts any new powers to strike down or reinterpret UK or Polish law including social law or labour law legislation. The European Parliament pointed out that Protocol No. 30 ‘is not an [‘opt-out’](#), it does not amend the Charter and it does not alter the legal position which would prevail if it were not to exist. Thus, the Parliament and other EU institutions considered the Protocol as a factor giving rise to legal uncertainty and thereby endangering the rule of law. The ECJ stated in the NS judgement that Protocol No. 30 [“does not call into question the applicability of the Charter in the United Kingdom or in Poland.”](#) The debates around the Protocol in some degree predicted the recent conflicts between the EU and UK and the EU and Poland.

When analysing the national identity of states, some academic literature^{vi} focuses on the judicial review of the member states’ Constitutional Courts and the practice of the Court of Justice, and on the issue of who the final arbiter is. However, this approach is misleading, because it shows us only the tip of the iceberg. Although some of these cases are very interesting and well researched,^{vii} this approach has a very limited potential to explain

the current challenges of the EU and of constitutional democracies. One of the problems with the approach is that it focuses mainly on judicial review and it does not take into account the different constitutional structure of states, for instance the British model which is based on parliamentary supremacy, and where the judicial review has a lesser role. But what is a more substantial problem is that it presupposes a “convergence between the principles of domestic constitutional law enjoying specific protection and the constitutional principles of the EU.”^{viii} That this might be misleading is proved by the Hungarian case, where the constitution (*‘Fundamental Law’*) in force since 2012 openly rejects European values by listing in its preamble elements necessary to common national identity, such as belonging to the ethnic nation, belonging to Christianity, fidelity, faith, and love. Nowadays, Hungary presents the most obvious case where all elements of constitutional democracy protected under Article 2 of the TEU are threatened: checks and balances, fundamental rights, the rule of law, etc. What is more, the recent Polish turn of events shows that the Hungarian way might appear a recipe to follow for other East and Central European Member States and maybe for other member states too.

The often used term “multispeed EU” means not only that some countries move faster in the same direction but it could also refer to the fact that some member states are moving in the opposite direction. A clear example for this is the Hungarian constitutional crisis, where according to many authors the democratic institutions (including the Constitutional Court) are sick or not working any more.^{ix}

In such a situation it is a mistake to focus only on what is the national courts’ or the CJEU’s interpretation of the protection of the national identities of member states because this standpoint presupposes that all member states respect the principles of constitutionalism and take part in the same discourse. And it is not enough to focus on the appearance of national identity in public law and political ethno-nationalism through the lens of constitutional law, but the analyses should be extended to the social and political causes of transforming national identities, i.e. the structural causes of the social demand for discourses and values of the nation.

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Not only new and old constitutional democracies but the EU also found itself in a difficult situation. If the EU does not apply effective sanctions against Hungary, it will compromise its core values. However, one can also argue that more effective measures against a Member State will strengthen “exit-minded” Eurosceptics. This might be the reason why the EU stood by idly and watched the demolition of constitutional democracy in Hungary passively. The EU’s legitimacy is thin and this weakness is reflected in its impotence in the face of the drift towards authoritarianism in CEEs. It remains to be seen whether such an authoritarian turn as the Hungarian can happen in old democracies and if their institutions are strong enough to limit the effects of global processes which are shaping the national identities of societies and the impact of Member States on the shared EU framework.

As Michael Keating states „There is a real prospect here for an English populist right movement of the sort we see in other European countries, with their mix of ethnic nationalism, nativism, Europhobia, protectionism and welfare chauvinism. The extreme right has never been a serious force in British politics but there have been bursts of support in the 1930s, the 1970s and the 1990s. There is no reason to think that the British are naturally immune to it.”

This article wants to underline that it is very dangerous for the institutions of constitutional democracy if the majority of the people does not share the constitutional values. It could mean a real danger for old member states too, which predicted by Eastern and Central European political turns. Hungary and Poland show that EU Member States can define their national identity in ways that breach the values of constitutionalism (e.g. equality, protection of human rights) yet this definition is supported by the majorities of people. The question arises whether the institutions of Western democracies are enough strong to ensure popular loyalty for values of constitutionalism.

ⁱ Margit Feischmidt, Balázs Majtényi, ‘Introduction’ in: Feischmidt Margit, Majtényi Balázs (ed.) *The Hungarian Fundamental Law and the Origins of New Nationalism* (manuscript)

ⁱⁱ Aristotle Kallis, ‘Far-Right “Contagion” or a Failing “Mainstream”? How Dangerous Ideas Cross Borders and

Blur Boundaries' *Democracy and Security* 2013/9, 235.

iii Ibid.

iv See to the topic of Brexit: Ralf Michaels, 'Does Brexit Spell the Death of Transnational Law' *German Law Journal* (Brexit Suppl), 17, 51., and Neil Walker, 'The European Fallout' *German Law Journal* (Brexit Suppl), 17, 125.

v Katja S. Ziegler, Elisabeth Wicks and Loveday Hodson, 'The UK and Human Rights: Some reflections' In: Katja S. Ziegler and Elisabeth Wicks and Loveday Hodson (ed.), *The UK and European Human rights (A Strained relationship)* Hart, Oxford and Portland, 2015, 504-506.

vi See e.g. Alejandro Sariz Arnaiz and Carina Alcoberto Llivina (ed.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013. or Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', (2011) 48 *Common Market Law Review* 1417.

vii For instance the Sayn-Witgenstein case (C-208/09) is relevant and edifying. The plaintiff with Austrian nationality adopted German nationality whose surname contained a nobility title of "Fürst" (Prince) and the Austrian authorities modified her name by removing the title. According to the Court it should be taken into account that the Law on the abolition of the nobility is an element of Austrian national identity. See to this Armin von Bogdandy and Stephan Schill, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, (2011) 48 *Common Market Law Review* 1423-1425.

viii Armin von Bogdandy and Stephan Schill, Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty, (2011) 48 *Common Market Law Review* 1433.

ix See e.g. Miklós Bánkúti – Gábor Halmai – Kim Lane Scheppele: From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions, in *Constitution for a Disunited Nation Hungary's New Fundamental Law*, ed. Gábor Attila Tóth, Budapest, CEU Press 2012, 268., Kim Lane Scheppele: Understanding Hungary's Constitutional Revolution in *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, eds. Armin von Bogdandy – Pál Sonnevend, Oxford-Portland, Hart, 2015., *Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws*, eds. Gábor Halmai and Kim Lane Scheppele (eds.), with Miklós Bánkúti, Tamás Dombos, Zoltán Fleck, Gábor Halmai, Krisztina Rozgonyi, Balázs Majtényi, László Majtényi, Eszter Polgári, Kim Lane Scheppele, Bernadette Somody, Renáta Uitz.

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